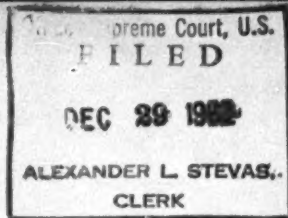


82-1192



NO....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

DIANE DIPIERO,

Appellant ,

vs.

ALLEN GOODMAN AND MICHAEL RUDY,

Appellee,

Jurisdictional Statement on Appeal  
from Massachusetts Appeals Court Required  
by Rule 12 of Rules of the Supreme Court  
of the United States.

Frank R. Saia, J.D.

55 State Street

Springfield, MA. 01103

(413) 736-3611

Counsel for Diane DiPiero

i.

QUESTION PRESENTED

Whether a decision by the Appeals Court of Massachusetts which had affirmed a decision in a legal malpractice suit granting a motion for directed verdict rendered by the Superior Court of Massaachusetts,denied the Appellant her right to due process;right to Equal Protection;and right to Trial by Jury as guaranteed by the United States Constitution under the Seventh and Fourteenth Amendments?

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I.

The Supreme Judicial Court of  
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 denying review of a decision by the Appeals  
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No....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

DIANE DIPIERO,

Appellant

vs.

ALLEN GOODMAN AND MICHAEL RUDY,

Appellee.

Petition of Jurisdiction on Appeal

The Appellant, Diane DiPiero, prays that jurisdiction on appeal issue to review the judgment and opinions of the Massachusetts Appeals Court entered in this proceeding on October 13, 1982.

Opinions Below

The opinion of the Massachusetts Court of Appeals is reported at Mass. App. 436 N.E. 2d 998, and appears as Appendix A. The Supreme Judicial Court of Massachusetts' certiorari denial is evidenced by the dismissal of Hampden County Superior Court Action 80-600 and appears as Appendix B and C.

Jurisdiction

The judgment of the Court of Appeals of Massachusetts and in turn the denial of certiorari by the Massachusetts Supreme Judicial Court was entered as a dismissal of the action for legal malpractice in

the Hampden County Superior Court, October 13, 1982. Petitioner's timely petition for review of original action is being filed within ninety days of that time.

This Court's jurisdiction is being invoked under Article III, Section 2 of the Constitution of the United States, as all available relief has been exhausted and petitioner presents there are exceptional circumstances warranting the exercise of the Court's original jurisdiction powers to see that justice is done in this case by the grant of an order for a new trial.

U.S. Constitutional Provisions Involved

United States Constitution Amendment

VII... " Jury Trial In Civil Case, In Suits  
at Common Law, where the value in  
controversy shall exceed twenty dollars,  
the right of trial by jury shall be  
preserved,...

United States Constitution Amendment XIV:

No State shall make or enforce any law  
which shall abridge the privileges or  
immunities of citizens of the United  
States; nor shall any State deprive any  
person of life, liberty, or property,  
without due process of law; nor deny  
to any person within its jurisdiction  
the equal protection of the laws.

STATEMENT OF THE CASE

This case involves an order by the Superior Court of Hampden County, Massachusetts allowing Defendant-Appellees motion for a directed verdict. The directed verdict was affirmed by the Massachusetts Appeals Court after oral argument and the Plaintiff-Appellant's application for further Appellate review was denied by the Supreme Judicial Court of Massachusetts.

The underlying case involves legal malpractice and a breach of contract against the Appellees for their continued failure to obtain an enforceable child support order. A legal malpractice action was brought before the Superior



Court, Hampden County, Massachusetts. At the close of the parties case, defendant moved for a directed verdict. The Appellees, after a chamber conference with the presiding judge, was allowed to enter a motion for a substitute directed verdict. The substitute directed verdict was allowed by the trial judge. The Appellant appealed to the Massachusetts Appeals Court, which affirmed the trial court's decision to allow the substituted motion for directed verdict. The Appellant then applied for further review with the Supreme Judicial Court of Massachusetts which was denied. Accordingly judgment was entered October 13, 1982 and this appeal was timely taken to the United States Supreme Court.

This Appellant contends that the standard for a motion for directed verdict as applied in this case conflicts with the Federal standard and deprives the Appellant of her due process, equal protection and Trial by Jury Rights under the United States Constitution.

REASONS FOR CONSIDERATION ON APPEAL

The judicial decree as set forth by the Massachusetts Appeals Court in this case, constitutes state action, explicitly discriminates in favor of the legal profession and is the epitome of de jure discrimination. The standard for legal

malpractice in Massachusetts, see Caverly  
v. McOwen 123 Mass.574 578 (1878);McLellan  
v. Fuller,226 Mass. 374,377-378;Glidden  
v. Terranova,Mass. App. Ct.

Adv.Sh.(1981)1831,1832,427 N.E. 2d  
1169;Nolan,Tort Law 185 (1979);Mallen  
& Levit,Legal Malpractice 663 (2d ed.  
1981);Note,Expert Testimony in Legal  
Malpractice Actions, 6 J Legal  
Prof.293(1981); Siano v. Marinelli 427  
N.E. 2d 480 (1981)..,discriminates against  
the plaintiff in requiring a plaintiff  
to obtain a higher standard of proof than  
that which other common law torts and  
breach of contract suits require.State  
action which appears to be

nondiscriminatory by its terms may also constitute a de jure violation of equal protection if it is "intentionally or purposefully" applied in a discriminatory fashion. The higher standard required to prove legal malpractice, a legal tort or breach of contract, is intentionally and purposefully applied in favor of all lawyers, and against all other persons.

In Tick Wo v. Hopkins (1886) a local ordinance required a license to operate a laundry. Despite non discriminatory terms, only Chinese were denied licenses. There was no justifiable explanation and this Court found intentional and purposeful discrimination

and violated equal protection. In the present case at bar a plaintiff is required to prove a tort or breach of contract at a level of proof and scrutiny which is higher than for all other torts and breach of contracts.

This pattern of discrimination is due to the Mass. Judicial Systems requirements of a higher standard of proof and the need for expert witnesses-even in the simplest of cases, in order for a plaintiff to win a legal malpractice suit. This pattern is evident in the history of legal malpractice cases as handed down by Mass. Courts. Such standards and requirements place an unfair

and undue burden on grieved plaintiffs in legal malpractice cases, therefore, denying plaintiff equal protection of the law.

Equal protection of the laws requires a course of procedure which is applied to legal proceedings in which a particular person is affected if such a course also would be applied to any other person in the state under similar circumstances and conditions. Tingsley v. Anderson, 171 U.S. 101.

Equal protection of the laws of a state is extended to persons within its jurisdiction, within the meaning of the Fourteenth Amendment, when its courts are



open to them on the same condition as to others in like circumstances, with like rules of evidence and modes of procedure, for the security of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts. Tresax v. Corrigan, 257, U.S. 312.

An act which in terms would give to one individual certain rights and the benefit of certain modes of procedure and would deny to another similarly situated the same rights could be challenged successfully on the ground of unjust discrimination and denial of the equal

protection of the laws. Backus v. Fort Street Union Depot Co., 169 U.S. 557.

In Slocum v. New York Life Insurance Co., 228 U.S. 364 this Court held that a constitutional right to trial by jury cannot be impaired or defeated by any action of the trial judge in assuming to take from the jury a case which presents disputed questions of fact.

In determining whether error was committed in directing a verdict, due consideration should be given the organic right of trial by jury; otherwise fundamental principles may be subordinated to procedure or convenience. Where the trial court directed

a verdict for the plaintiff, it must be able to sustain its judgment as the proper conclusion of the law upon the uncontradicted or admitted facts of the case. Ankeny v. Clark, 148 U.S. 345.

A judgment entered on a verdict directed by the court must stand, unless the court's ruling is wrong as a matter of law. Sena v. American Turquoise Co., 220 U.S. 497.

Thus, as the present case at bar indicates, the direction of a verdict for one party when there is substantial evidence tending to prove the issue upon which the jury could lawfully find a verdict for the opposite party is reversible error.

In the instant case plaintiff successfully defeated defendant's motion under 12 (b)6 for failure to state a claim upon which relief can be granted.

The rule has been laid down that an institution to find for the defendant must be tested by the same rules that apply in the case of a demurrer to evidence, and that if the facts established and the conclusions which they reasonably justify do not disclose a valid cause of action against the defendant, the judgment must be affirmed. Merrick's Executor v. Giddings, 115 U.S. 300.

Finally, in Inwood Laboratories, Inc. v. Ives Laboratory, Inc., 102 S.Ct. 2182 (1982), the U.S. Supreme Court stated that

an Appellate Court cannot substitute its interpretation of the evidence for that of a trial court, simply because the reviewing Court might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which court(s) deem innocent.

The Appeals Court of Massachusetts misapplied the standard rule which the Hampden County Superior Court was obliged to use, namely, that the defendants' motion for directed verdict must be denied if there is any inference from the evidence or the testimony which would allow the

jury to believe the Appellant's prima facie case, in her claim for legal malpractice against the Appellees. It is undisputed defendants failed to complete their contract of employment when they failed in June, 1971 and subsequently to proceed against plaintiff's ex-husband in a petition for modification of the divorce decree they obtained in May, 1971 when they knew exactly where the ex-husband was, and how to perfect service upon him, yet did nothing to obtain a valid and enforceable child support order against her absent husband. Plaintiff alleged



defendants knew the address of her ex-husband at the time of the filing of the original libel for child support, yet the defendants used publication as a means to notify him.

The Appeals Court of Massachusetts focused ,in error,on defendants' assertion of "sketchy" information of the husband's whereabouts as if that were the only error plaintiff was alleging the defendants made in negligently handling their contractual duties to her. The Appeals Court of Massachusetts, in error, completely missed the significance of the knowledge and

actions of the defendants in their Letters of May 26, 1971, and June, 1971 and August, 1971, which clearly show the defendants had the correct address of plaintiff's ex-husband. At that point, they were still under a contractual duty to obtain a good and enforceable money judgment. They did not go back to the Suffolk Probate Court and ask for a Modification of the Child Support Order based on the then available ACTUAL notice to plaintiff's ex-husband. They caused plaintiff to rely on a child support judgment which was rendered ex parte with CONSTRUCTIVE Notice to the plaintiff's ex-husband. According to defendant Allen

Goodman's statement he says he knew and he told plaintiff that the money judgment was no good.

Plaintiff denied ever having been told by defendants that the money judgment was no good. On the contrary she produced evidence showing defendants had told her of the retroactive enforceability of the child support order her attorneys had purportably obtained for her.

Knowledge and Foreseeability of harm are the wellsprings of Tort liability.

Further, plaintiff introduced evidence which were in the form of letters to plaintiff-appellant which she claimed led her to believe the money judgment for child

support was good, and accruing to be collectable in a lump sum whenever her husband returned to Massachusetts. She was never notified that the money judgment was no good. She stated that if she had been so notified, she would have done whatever was necessary to obtain a good and sufficient money judgment against her ex-husband. The only time she discovered that the money judgment was no good was in March, 1980, when Judge Warner of the Suffolk Probate Court No. 83656 dismissed her complaint for contempt with prejudice against her ex-husband. A new \$300.00 per month child support order was entered 90 days later.

The jury could have found for plaintiff. The jury could have drawn an inference from Judge Mahoney's order in Suffolk Probate Court No.83656 decree of 1970 in which \$300.00 per month was granted to plaintiff for child support, and such an order was enforceable and available again whenever the defendants performed as they were contracted to do, namely, obtain a child support order against plaintiff's ex-husband which would reduce the father's statutory duty to pay child support to an enforceable money judgment.

The Hampden County Superior Court Judge failed to allow the case to go to the jury

and failed to instruct the jury on the law requiring the jury to take notice that plaintiff's ex-husband had a Statutory duty to support his child. The Massachusetts Probate Court had the jurisdiction over the absent husband provided he was given the best notice under all facts and circumstances. MGL Ch. 2223 and 227. The plaintiff's attorneys had a continuing duty under their contract for legal services, even after the divorce, to provide that notice if they knew as they had testified that the money judgment was no good and ACTUAL notice and opportunity to be heard was available to plaintiff's ex-husband. Therefore, the ability to perform



on their contract was available to Appellees. Defendants' Goodman's statement that he told plaintiff the money judgment of May 21, 1971 was no good contradicts his letter of May 26, 1971, drafted just five days later. This letter showed that defendants knew exactly where the plaintiff's ex-husband was. This letter shows they were trying to collect the \$300.00 per month child support. They sent a copy to plaintiff coupled with other letters submitted into evidence the jury could draw an inference that the plaintiff was misled into waiting when she should have been pursuing.

From all these inferences there was no "feeling" of a "dubious" money judgment on the part of the defendants, as the Appeals Court of Massachusetts has stated in its RESCRIPT. There was "Knowledge" of an "absolutely unenforceable" money judgment on the part of defendants which the jury could find was capable of being made enforceable. The jury could find that Judge Mahony of the Suffolk Probate Court, would again order \$300.00 per month whenever defendants fulfilled their contract to plaintiff. The jury could find that the plaintiff was induced by defendants to rely to her detriment upon defendants paid for advice to wait.

The jury could choose to disbelieve Allen Goodman when he said he knew that the money judgment was no good and he told Ms. DiPiero.

The jury could have found of its own knowledge even without the help of plaintiff's expert witness, that there was a breach of contract; and a failure to zealously represent plaintiff when defendants failed to inform her of a material fact, namely, that the money judgment purported to have been granted to her, was no good. But for their misrepresentation she could have demanded and received a partial refund and hired

a lawyer to file a Complaint for Modification of the defective child support order. The jury could find that defendants were still under contract to plaintiff and were still bound to start a Complaint for Modification now that it was clear that the letter sent to the ex-husband was presumptively received leaving the jury to draw the inference that ACTUAL notice was available and, therefore, a good money judgment was capable of being rendered but for defendants' negligence.

The Appeals Court of Massachusetts focused on the first tort in

December, 1970, and completely missed the second tort committed after divorce was granted in May 21, 1971. Had they done so. They could focus on the simple issue well within the knowledge of a lay jury, that of a simple breach of an attorney's contractual duty to his client to continue to pursue the money judgment she hired them for. As soon as defendants' knew where the husband was and, that the money judgment they obtained was admittedly no good, they had a continuing duty to file a Complaint for Modification to obtain a good money judgment to complete their contract.

It is a question for the jury and not

the trial judge to decide issues of fact whether the attorneys representing plaintiff failed to perform their contractual duties. It is beyond the scope of the trial judge and the appellate judges to cast the facts such that the defendants' motion for a directed verdict can be upheld. Rather it is the duty of the trial and appellate judges to find any set of facts and inferences from those facts which the jury could have believed to find in favor of the plaintiff. Therefore, it is an abuse of discretion to grant defendants' motion for a directed verdict just because there is some way to sustain the



plaintiff's version of the facts that he fulfilled his duty to warn his client of latent defects in his work. The jury could find there was a duty on those who create foreseeable peril, not readily discoverable by endangered persons, to warn them of such potential peril.

CONCLUSION

For these reasons, review of the original action of the Superior Court of Massachusetts, Hampden County, the Massachusetts Appeals Courts and the denial of review of the Supreme Judicial Court should be granted.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Frank R. Saia".

Frank R. Saia

55 State Street

Springfield, MA. 01103

1-413-736-3611

Counsel for

Diane DiPiero

APPENDIX A.

June 30,1982

Hmdn.81-1075

Appeals Court

DIANE DIPIERO vs.ALLEN GOODMAN &another

The plaintiff brought an action in tort against the defendant attorneys for legal malpractice. She alleged that the attorneys had represented her in divorce proceedings commenced about December 7,1970, and that they had negligently failed to obtain service on her husband in a manner which would provide her with an enforceable judgment of child support. She sought to recover from the defendants approximately ten years of unpaid child support payments as well as legal fees and expenses incurred

in the prosecution of the malpractice claim. At the conclusion of the plaintiff's case, the directed a verdict in the defendants' favor. Mass. R. Civ. P. 50(a), 365 Mass. 814 (1974). The plaintiff has appealed.

The plaintiff was required to present evidence sufficient to warrant jury findings that the defendants had failed to exercise reasonable care and skill in handling her case, see Caverly v. McOwen, 123 Mass. 574, 578 (1878); McLellan v. Fuller, 226 Mass. 374, 377-378 (1917); Glidden v. Terranova, Mass. App. Ct. Adv. Sh. (1981) 1831, 1832, that she incurred a loss, and that the defendants' malpractice was the

proximate cause of the loss, see McLellan v. Fuller, supra at 378; Nolan, Tort Law S 185 (1979). There was nothing in the testimony of the defendants or in their communications with the plaintiff which could have been found to constitute an admission of malpractice. Compare Republic Oil Corp. v. Danziger, Mass.

App.Ct.Adv.Sh. (1980) 425, 426. See Mallen v. Levit, Legal Malpractice S 663 (2d ed. 1981). Whether a reasonably competent lawyer would have proceeded differently under former Rule 41 of the Probate Courts (1959), or any statute which governed service in domestic relations cases in 1970, based on the sketchy information furnished by the plaintiff about her

husband's whereabouts in Africa, or the information that he was in Boston on some unspecified day in December, 1970, was not within the field of common knowledge possessed by a jury. As a consequence, the plaintiff was obliged to present expert testimony "to establish the standard of care owed by an attorney in the particular circumstances and the defendant(s') alleged departure from it ". Glidden v.

Terranova, supra. See Nolan, supras

186; Barry, Legal Malpractice

in Massachusetts, 63 Mass. L. Rev. 15, 117

(1978); Note, Expert Testimony in Legal

Malpractice Actions, 6 J. Legal Prof. 293

(1981). The plaintiff's expert appears to



have been qualified and presented principally as an expert on professional responsibility. He offered no testimony as to how the defendants should reasonably have proceeded on the facts available to them, nor did he express the view that the manner in which notice was given to the husband amounted to legal malpractice. In particular, he expressed no opinion that any act or omission of the defendants violated any of the three standards for determining competency set forth in Supreme Judicial Court Rule 3:22 (now redesignated Rule 3:07), DR 6-101, 359 Mass. 818 (1972). We assume that such an opinion could properly have been formulated on the plaintiff's

evidence, and if so, that it would have been sufficient in law to support a finding of malpractice, see Mallen & Levit, supra S 67; cf. Sullivan v. Birmingham, Mass. App.Ct. Adv.Sh. (1981) 326, 327-328, 335-336 (non-client plaintiff). The opinion which he did express, that the defendants should have advised the plaintiff of their feeling that service in the manner directed by the citation issued by the Probate Court provided a dubious basis for enforcing the child support order, was insufficient to establish negligence. Finally, there was no evidence which would warrant a jury in concluding that had the defendants perfected personal service on the

husband, the plaintiff would have succeeded in recovering payment of any of the amount ordered for child support. See McLellan v. Fuller, supra; Siano v. Martinelli, Mass. App.Ct. Adv. Sh. (1981) 1678; Hurd v. DiMento & Sullivan, 440 F. 2d 1322, 1323 (1st Cir.) cert. denied, 404 U.S. 862 (1971). The failure of proof on these necessary elements of the tort required the allowance of the defendants' motion.

Judgment affirmed.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court for the Commonwealth  
at Boston, September 30, 1982

ORDER

It is hereby Ordered, that the following  
Applications for Further Appellate Review  
be denied:

M-2320     DIANE DIPIERO

vs.

ALLEN GOODMAN & another

(Hampden Superior

No. 80-600; A.C.

No. 81-1075)

By the Court,

Patrick J. Hurley,

September 30, 1982

Clerk

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT

DEPARTMENT OF THE

TRIAL COURT

CIVIL ACTION

No. 80-600

Diane DiPiero, Plaintiff

vs.

Allen Goodman, Michael Rudy. Defendant(s)

JUDGMENT FOR DEFENDANT(S) AFTER RESCRIPT

This action was appealed to the Appeals Court, the issues having been duly heard and the Appeals Court having duly issued a rescript It is Ordered and Adjudged that the plaintiff Diane DiPiero take

nothing, that the action be dismissed on  
the merits and that the defendant(s) Allen  
Goodman, Michael Rudy recover of the  
plaintiff Diane DiPiero no costs.

Dated at Springfield, this 13th day  
of October, 1982.

Hampden County

Superior Court

Filed

OCT 13, 1982

Joseph P.

Edward G. Shea,

Zajac,

Clerk

Asst. Clerk



APPENDIX D

SUPREME COURT OF THE UNITED STATES

NOTICE OF APPEAL

Dated October 28, 1982

Diane DiPiero,

Appellant,

vs.

Allen Goodman and Michael Rudy,

Appellees.

Now comes the plaintiff, Diane DiPiero, in her complaint of Legal Malpractice against the defendants, Allen Goodman and Michael Rudy originating in Hampden County Superior Court No. 80-600 which granted defendants'

117-2320  
RECEIVED  
SUPREME COURT OF FL  
FOR THE COMMONWEALTH  
PATRICK J. MURLEY, CLERK

OCT 28 1982

motion for directed verdict and such action was affirmed by the Massachusetts Appeals Court No.81-1075 and Certiorari was denied by the Supreme Judicial Court of Massachusetts causing plaintiff's cause of action to be denied as of October 13,1982 and serves Notice of her Appeal to the Supreme Court of the United States stating her consitutional due process, and trial by jury rights have been violated.

FRANK R. SAIA, J.D.

55 State Street

Springfield, MA. 01103

(413) 736-3611

Counsel for

Diane DiPiero

Certificate of Service

On October 28, 1982 by mail postage prepaid service of the above Notice of Appeal has been made to the Massachusetts Supreme Judicial Court at New Court House, Pemberton Square, Boston, MA> and Attorney William Clancy, Counsel for the Defendants at Burns and Levinson, 50 Milk Street, Boston, MA. (617) 451-3300.